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MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

October Term, 1976

No. **76-1028**

AZALEA DRIVE-IN THEATRE, INCORPORATED  
and TWIN DRIVE-IN THEATRE, INC.,

*Petitioners,**against*

BURTON H. HANFT, individually, and d/b/a SARGOY, STEIN & HANFT (a Partnership), formerly known as Sargoy & Stein, Attorneys, DAVID FALICK, PHILLIP KORNFELD, PARAMOUNT PICTURES CORP., METRO-GOLDWYN-MAYER, INC., TWENTIETH CENTURY FOX FILM CORPORATION, WARNER BROTHERS DISTRIBUTING CORPORATION, BUENA VISTA DISTRIBUTION COMPANY, INC., UNITED ARTISTS CORPORATION, UNIVERSAL FILM EXCHANGES, INC., COLUMBIA PICTURES INDUSTRIES, INC., and AMERICAN INTERNATIONAL PICTURES, INC.,

*Respondents.*

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**RESPONDENTS' BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI**

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BURTON H. HANFT, individually, and d/b/a SARGOY, STEIN &  
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PANY, INC., UNITED ARTISTS CORPORATION, UNIVERSAL FILM  
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AMERICAN INTERNATIONAL PICTURES, INC.,

*Respondents.*

**RESPONDENTS' BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI**

**Question Presented**

The only question presented by this petition is whether  
a party who has fully litigated a factual issue in a state  
court may relitigate the identical factual issue in a subse-

quent federal action. The five "questions" posed by petitioners are merely contentions relating to this question, but we shall, nevertheless, respond to those contentions *seriatim*.

### Statement of the Case

This is a highly tenuous (see, *e.g.*, 22a)\* antitrust action by motion picture drive-in theatres (hereinafter "Azalea") against nine distributors and Sargoy, Stein & Hanft (hereinafter "Sargoy"), the law firm retained by these distributors to verify the exhibitors' compliance with the provisions of their exhibition agreements. The claim upon which the action is based was belatedly contrived as a means of circumventing liability under a valid promissory note. The facts are, briefly, as follows:

Most of the motion pictures licensed by the distributors to Azalea were licensed under "agreements providing for a payment of a percentage of a theatre's box-office receipts to the distributor" (3a). The distributors were expressly authorized by the agreements "to make periodic inspections and to audit the books of the theatre in order to insure that the theatre is not underrepresenting box office receipts," and they retained Sargoy "to conduct the required investigations" (*Id.*). Sargoy arranged for the employment of independent "checkers" to visit Azalea's theatres, and the reports of those checkers indicated underreporting of box office receipts, so that Sargoy then sent an auditor to

\* Numerical references followed by "a" are to pages in the Appendix to the petition for certiorari, whereas those preceded by "A" are to pages of the Joint Appendix in the Court of Appeals. References preceded by "Tr." are to the transcript included in the record in that court.

examine the exhibitors' records (A221-22). On the basis of the checking analysis and the records supplied by Azalea, "the defendants estimated that there had been underdisclosure and underreporting by as much as \$240,000" (*Id.*). As the Court of Appeals found, the checkers' "testimony was strongly corroborated by objective evidence obtained from the independent concessionaire" (5a, n.1).\*

After lengthy discussions, Azalea, on February 12, 1971, offered to pay \$70,000 in settlement of the distributors' claim, and delivered a promissory note for that amount, together with post-dated checks for the first installment, to Sargoy (A122, A341, A378). That offer was accepted (A167). Azalea never asserted or intimated that the note had been obtained from them by coercion, duress or anti-trust violation until their answer in the Virginia court action on April 10, 1972—*fourteen months* after they had delivered the note—although there were several communications between Azalea or their attorneys and Sargoy in which such an assertion, if true, would certainly have been made.

\* The receipts from the independent concessions for the sale of food and drink were checked against the reported box office receipts and a comparison was made between the ratios derived on "open check" days, when Azalea knew the theatres were being checked, and those for "blind check" days, when Azalea did not know they were being checked (A247-50). On open check days those receipts amounted to 42 percent of the reported box office receipts, whereas on adjacent days when the theatres were blind checked and the same feature was showing the concession sales were in excess of 80 percent of the reported box office receipts (A454-57). As was observed in *LCL Theatres v. Columbia Picture Industries*, 421 F.Supp. 1090, 1094 (N.D. Tex. 1976), a similar case: "Either the theatre audiences experienced greater appetites for food and drink on blind check days than open check days or the managers were 'dumping' portions of the box office receipts into the concession sales."

### The Prior State Court Action

After Azalea had defaulted under the \$70,000 promissory note, Sargoy, on November 15, 1971, instituted an action against Azalea on that note in the Virginia State Court. On April 10, 1972, Azalea filed an answer admitting execution of the note (A153, A155) and asserting, by way of affirmative defense, that it had been obtained under duress:

"The instrument sued on herein was obtained from defendants [Azalea] by plaintiffs [Sargoy] by *duress* \* \* \* when plaintiffs and their principals did *threaten* that plaintiffs' principals, who are movie distributors, would *refuse to deal* with defendants [and] \* \* \* they \* \* \* did further exert such *coercion* and *economic pressure* that the defendants, fearful of the possible consequences of the actions *threatened*, signed the instrument \* \* \* *solely as the result of the aforesaid threats* and for no other reason" (A154) (emphasis supplied).

Azalea also interposed an additional affirmative defense and counterclaim based on the same facts, but which characterized those facts as violations of the Sherman Act (A155). That antitrust defense and counterclaim was dismissed as not cognizable by the state court, under such established authorities as *Kelly v. Kosuga*, 358 U.S. 516 (1959) (A161).

The action was tried by the court without a jury, and the court rendered its decision in favor of Sargoy on January 4, 1974 (A149). The trial court rejected Azalea's defense that the note had been obtained under duress, by the threat of a group boycott, holding:

"As the trier of the facts, the court decides same in favor of the plaintiffs [Sargoy]" (A150).

Azalea appealed the judgment to the Supreme Court of Virginia and assigned as error, *inter alia*, the "finding that the note and offer of settlement by defendants, made on February 12, 1971, and thereafter were not made under and as a direct result of coercion and duress" (A188). The judgment, including the finding of no duress, was unanimously affirmed by that court on April 28, 1975.

Azalea then petitioned this Court for certiorari, and the petition was denied. *Azalea Drive-In Theatre, Incorporated v. Sargoy*, 423 U.S. 940 (1975).

### The Proceedings Below

Azalea filed the complaint in the case at bar on August 30, 1973 (A1). It charges, in substantially the same language as the duress defense in Azalea's state court answer (*supra*, p. 4):

"That sometime prior to the year 1970, and for a long and continuous time \* \* \* the defendants \* \* \* engaged in an unlawful combination and conspiracy and unreasonable restraint of \* \* \* interstate trade and commerce \* \* \* [in that] defendants \* \* \* did conspire to *force* the [plaintiffs] \* \* \* and did illegally, wrongfully and by monopolistic and *economic threat*, *coercion* and *duress*, obtain from plaintiffs a certain indebtedness in the amount of \$70,000, which they continue to hold in effecting a tying arrangement that required plaintiffs to so execute such a note as an absolute condition of continuing to obtain motion picture films from said distributors \* \* \*" (A8, A12-13) (emphasis supplied).

Defendants' answers consisted of general denials and, after the entry of judgment in the state court action, were

supplemented by the affirmative defense of collateral estoppel.

The "coercion" upon which the instant action is based consists of an alleged threat by Sargoy's auditor of "a group boycott," viz., that unless Azalea delivered the note, the distributors would not license pictures to them—a threat which was unequivocally denied (4a; A332-33). However, as Azalea repeatedly conceded, no distributor ever boycotted or discontinued service to them, and they did not lose any business or suffer any damages by reason of any such boycott (A394, A411, A413).<sup>\*</sup> Nor was there any evidence that any distributor had ever, at any time, threatened to boycott Azalea or any other exhibitor (*Id.*).

The Court of Appeals held that the alleged coercion was identical with the coercion urged and rejected in the state court action (4a), and the issue having been litigated and decided there in favor of defendants herein, it "was not open to relitigation in the district court" (5a).

<sup>\*</sup> Petitioners' statement (p. 4) that the distributors, by retaining Sargoy, "compell[ed] individual exhibitors to pay higher film rental prices" is an outright misstatement of the record. Not only was there not one iota of evidence to that effect (page 213 of the transcript, cited by petitioners, is completely irrelevant), but the trial judge expressly refused Azalea's request to instruct the jury that Azalea claimed a conspiracy "to fix prices" (Tr. 581, 589, 655). Thus, Azalea's own counsel stated to the court before the charge: "You have ruled out price-fixing" (Tr. 588).

## ARGUMENT

### I

**The decision of the Court of Appeals neither "undermines" nor "constitutes a radical departure from" the federal decisions on collateral estoppel but, on the contrary, is fully supported by them.**

Concededly, both the state court defense and the instant action were founded upon exactly the same alleged threat of a group boycott by Kornfeld, an auditor employed by Sargoy. Indeed, the testimony given in the state court was repeated almost verbatim at the trial herein and, as above indicated, the allegations of the pleadings were virtually identical. As was held by the Court of Appeals:

"any issue of ultimate fact which was actually litigated and necessarily determined in a prior action cannot again be litigated between the same parties. *Yates v. United States*, 354 U.S. 298, 335-36 (1957); *United States v. Davis*, 460 F.2d 792, 795-96 (4th Cir. 1972)" (5a).

Moreover, it has been repeatedly and uniformly held that collateral estoppel, by a federal or state court judgment, applies in a subsequent antitrust litigation. *Granader v. Public Bank*, 417 F.2d 75 (6th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970); *Ellingson Timber Co. v. Great Northern Ry. Co.*, 424 F.2d 497 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Household Goods Carriers' Bureau v. Terrell*, 417 F.2d 47 (5th Cir. 1969); *Fleischer v. Paramount Pictures Corp.*, 329 F.2d 424 (2d Cir.), *cert. denied*, 379 U.S. 835 (1964); *Singer v. A. Hollander & Son, Inc.*, 202 F.2d 55 (3d Cir. 1953); *Collidotronics, Inc. v. Stuyvesant Insurance Co.*, 290 F.Supp. 978 (E.D. Pa. 1968).

In an effort to circumvent this established principle, the petition (p. 11 *et seq.*) poses two possible alternative interpretations of the rationale of the state court judgment, other than that no threat was actually made. Neither of these, however, can withstand scrutiny.

(1) The first is that the state court might have decided that the alleged threat was not "unlawful under state law." That hypothesis, however, is palpably impossible, and contrary both to the facts and the law. The only threat alleged was a threat of "a group boycott," whereby Azalea was coerced into executing the \$70,000 promissory note (3a). Such a threat is and always has been unlawful under Virginia law.

It is the law of Virginia that a violation of the Sherman Act constitutes a violation of the Virginia antitrust statute, Va. Code Ann. §§59.1-22 and 1-23 (1968), which prohibits any combination the purpose of which is, among other things, "to create and carry out restrictions in trade or business." *Blue Cross v. Commonwealth*, 211 Va. 180, 192, 176 S.E.2d 439, 446 (1970) (holding that a combination to fix or stabilize prices, which is a *per se* federal violation, violates Section 59.1-23 "for the same reasons"); *Hercules Powder Co. v. Continental Can Co.*, 196 Va. 935, 86 S.E.2d 128 (1955); *Werth v. Fire Companies' Adjustment Bureau, Inc.*, 160 Va. 845, 171 S.E. 255, *cert. denied*, 290 U.S. 659 (1933); *Wiseman v. Dennis*, 156 Va. 431, 157 S.E. 716 (1931); *Norfolk Motor Exchange, Inc. v. Grubb*, 152 Va. 471, 147 S.E. 214 (1929); see also, Comment, *A Fix At the Local Drug Store—Blue Cross Runs Afoul of the Sherman Act*, 57 Va. L.Rev. 315, n.2 (1971). Indeed, Section 59.1-9.17

(1974) expressly provides that "[t]his chapter shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions."

In addition, a group boycott was illegal under common law. As stated in the chapter on "Antitrust and the Common Law" in a leading text:

"A refusal to deal with a particular individual, however, is illegal if it is done in concert with others with a view toward injuring him." 1 J. Von Kalinowski, *Antitrust Laws and Trade Regulation* §1.03[4], at 1-58 (1976).

To this effect see, *e.g.*, *Locker v. American Tobacco Co.*, 195 N.Y. 565, 88 N.E. 289 (1909); *Grillo v. Board of Realtors*, 91 N.J. Super. 635, 219 A.2d 635 (1966).

Finally, an *unlawful* threat was the keystone of Azalea's defense in the state court suit. No party at any stage of the proceedings in the state court action argued that the threat, if made, was lawful. To the contrary, Azalea's counsel urged, both in the lower state court and on appeal from the judgment, that the alleged threat violated Virginia law. It is thus wholly unreasonable to conclude that it was within the contemplation of the state trial judge that the alleged threat was lawful. As Judge Learned Hand said in a similar situation:

"The doctrine of *res judicata* rests upon the importance of ending controversies once and for all, and allows for no exceptions based upon imported ingenuities of which the judges were unconscious \* \* \*." *Irving National Bank v. Law*, 10 F.2d 721, 724-25 (2d Cir. 1926)

(2) The second alternative interpretation of the state court judgment is that the alleged threat might not have had coercive effect. However, as the Court of Appeals observed:

“the factual dispute in the federal court was exactly the same as the factual dispute in the state court. \* \* \* The testimony for the defense was that no such threat was made. *No one suggested that a threat was made but that it was made and understood to have been in jest or for some other reason did not restrict the exhibitor in the free exercise of his will.* When the state trial judge stated that he found the facts in the plaintiffs’ favor, he must have found that no threat had been made” (4a-5a) (emphasis supplied).

Moreover, unless the threat had coercive effect, there could have been no antitrust violation, nor could there have been any resultant injury to petitioners, since the requisite causal connection between the threat and any damages would be lacking. “Coercion is the essence of antitrust \* \* \*” 1 R. Callman, *Unfair Competition, Trademarks and Monopolies* §15.3(c)(5), at 362-63 (3d ed. 1967). And damage to business or property “by reason of” an antitrust violation is a *sine qua non* in any private antitrust suit. Clayton Act §4, 15 U.S.C. §15; *Brunswick Corporation v. Pueblo Bowl-O-Mat*, — U.S. — (Jan. 25, 1977); *Miller Motors v. Ford Motor Co.*, 252 F.2d 441, 448 (4th Cir. 1958); see, *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966).\*

\* Contrary to the argument advanced in the dissenting opinion (8a), in the federal action *Azalea* was required to prove that the alleged threat overcame the will of its officials, to the same extent as it

(footnote continued on next page)

Thus, whatever the ground for the state court’s finding—that the alleged threat was not made or that it did not result in coercion—the judgment there is completely dispositive of *Azalea*’s case here. When a judgment is given on alternative grounds, and either alternative would preclude recovery in the subsequent action, collateral estoppel properly applies. Restatement of Judgments §68, comment n (1942); 1B J. Moore, *Federal Practice* ¶0.443[5], at 3921-22 (1961); Note, 39 Va. L.Rev. 556, 568 (1953); *Irving National Bank v. Law*, 10 F.2d 721 (2d Cir. 1926); *Holmgren v. Westport Towboat Co.*, 260 Ore. 445, 490 P.2d 739 (1971); *Kelley v. Curtiss*, 16 N.J. 262, 108 A.2d 431 (1954); *Patterson v. Saunders*, 194 Va. 607, 74 S.E.2d 204 (1953).

## II

**All “vital policy considerations” compel, rather than preclude, the application of collateral estoppel.**

As set forth above, the policy underlying collateral estoppel is itself of great importance (*supra*, p. 9) and collateral estoppel, based on judgments in actions of a commercial nature in federal or state courts, has been uniformly applied in antitrust suits (*supra*, p. 7).

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was required in the state action. *Automatic Radio Manufacturing Co. v. Hazeltine Research*, 176 F.2d 799, 804-05 (1st Cir. 1949), *aff’d*, 399 U.S. 827 (1950); *Jack Winter, Inc. v. Koratron Co.*, 329 F.Supp. 211, 213 (N.D. Cal. 1971). As the trial court below correctly ruled: “We thus reject the plaintiffs’ contention that the doctrine [of collateral estoppel] is inapplicable because the standard of duress in a federal antitrust action is somehow different from the standard applied in a state action. Our review of the cases establishes that elements necessary to prove duress are the same in federal and state courts” (17 a, n.10).

*Lyons v. Westinghouse Electric Corporation*, 222 F.2d 184 (2d Cir. 1955), cited in the petition (p. 14), is actually in accord. Judge Learned Hand there stated that an estoppel applies to a "finding of one of the constituent facts that together make up a claim," as distinguished from "the entire congeries of such facts taken as a unit" (222 F.2d at 188). In the instant case, respondents have invoked collateral estoppel only with regard to one "constituent fact," namely, alleged coercion in obtaining the note. None of the other issues in the "entire congeries" of the antitrust claim is involved: neither the alleged conspiracy among the defendants, nor Kornfeld's authority to make the threat, nor the amount of damage.

Indeed, in *Becher v. Contoure Laboratories, Inc.*, 279 U.S. 388 (1929), cited and followed by Judge Hand in *Lyons*, this Court expressly rejected the argument of petitioners herein that a state court judgment cannot effect a collateral estoppel in a subsequent action over which the federal courts have exclusive jurisdiction. Mr. Justice Holmes there said:

"That decrees validating or invalidating patents belong to the courts of the United States does not give sacrosanctity to facts that may be conclusive upon the question in issue. A fact is not prevented from being proved in any case in which it is material, by the suggestion that, if it is true, an important patent is void; and, although there is language here and there that seems to suggest it, we can see no ground for giving less effect to proof of such a fact than to any other. A party may go into a suit estopped as to a vital fact by a covenant. We see no sufficient reason for denying that he may be equally estopped by a judgment." *Id.* at 391-92.

### III

**Respondents never took any "inconsistent position."**

Petitioners' contention of inconsistency on the part of respondents is not only irrelevant but is false in fact and erroneous in law.

Respondents, in opposing Azalea's motions to enjoin the pending state court action pursuant to 28 U.S.C. §2283, merely argued that this restrictive statute did not furnish a basis for the granting of the preliminary injunction sought. The district court, in denying injunctive relief, cited a few of the many pertinent authorities which demonstrate the fallacy of petitioners' present argument (24a-25a).

For example, in *Reines Distributors, Inc. v. Admiral Corporation*, 182 F.Supp. 226 (S.D.N.Y. 1960)—which, as the court observed, "is right on point with this case" (25a)—the antitrust defendants had also brought suit against the plaintiff in a state court on promissory notes. The plaintiff there also contended that the notes had been obtained in violation of the antitrust laws and, therefore, moved to restrain the defendants from prosecuting the state court action, and the defendants, as here, opposed that application. The injunction was denied, even though it was evident that some of the same issues would necessarily be raised in the state court.

Obviously, respondents never represented that facts which might be determined adversely to Azalea in the

state court would not be the subject of collateral estoppel in the instant action. Indeed, they could not then have known what the evidence in the federal court trial, held eight months later, would show.

The only "inconsistent position" taken is that of the petitioners who, in the state court, insisted that the duress they alleged was unlawful under Virginia law and now contend otherwise.

#### IV

**The decision that petitioners are barred by collateral estoppel does not deprive them of their right to trial by jury in the instant action.**

Petitioners speciously argue that, since there was no jury in the state court action, the application of collateral estoppel in the instant jury action deprives them of their constitutional right to a jury trial. To accept this argument would emasculate the entire doctrine of collateral estoppel, by rendering it inapplicable whenever the first action was tried without a jury and the second is triable with one.\* The argument is also contrary to the decisions.

A similar contention, that the application of collateral estoppel by a judgment in a non-jury action deprived a

\* Petitioners' reference to the striking of the antitrust defense in the state court action is completely irrelevant since the same factual issues were tried under another legal rubric. Moreover, as this Court has clearly held, such a defense may not be asserted in an action on a promissory note which "constitute[s] an intelligible economic transaction in itself." *Kelly v. Kosuga*, 358 U.S. 516, 521 (1959). Indeed, petitioners urged the striking of this defense as a ground for certiorari from the Virginia Supreme Court's decision, and that petition was denied. *Azalea Drive-In Theatre, Incorporated v. Sargoy*, 423 U.S. 940 (1975).

party of its constitutional right to a jury trial in the subsequent action, was squarely rejected in *Crane Co. v. American Standard, Inc.*, 490 F.2d 332 (2d Cir. 1973). The Court of Appeals there held that a judgment in an action in equity must be given collateral estoppel effect in a subsequent action at law, despite the right to a jury trial in the latter, and that such collateral estoppel does not deprive a party of his Seventh Amendment right to a jury trial. Chief Judge Friendly commented:

"This point as to the true bearing of *Beacon and Dairy Queen* is forcefully made in an able note by Professor David L. Shapiro and Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 Harv. L. Rev. 442, 445-48. The authors continue with a further discussion, *id.* at 448-55, which is highly pertinent here. The framers of the Seventh Amendment sought to preserve the right to a jury trial in civil cases as it had existed 'at common law'. The authors cite abundant eighteenth century precedent, on both sides of the Atlantic, that a decree in equity was recognized as having preclusive effect in a subsequent action at law between the same parties. With the merger of law and equity effected by the Federal Rules of Civil Procedure, *a judgment in a suit which had been properly brought and tried as a suit in equity must govern all future proceedings between parties to which collateral estoppel would normally apply.*" *Id.* at 343 (emphasis supplied).

In full accord is Section 68 of the Restatement of Judgments (1942), relating to collateral estoppel:

"j. Action at law and suit in equity. The rules stated in this Section are applicable to suits in equity as well as to actions at law. Where in a proceeding in equity a question of fact is actually litigated and deter-

mined by a valid and final decree, the determination is conclusive between the parties in a subsequent proceeding either at law or in equity on a different cause of action.

**Illustration:**

4. On the same day A and B make two contracts, by one of which B agrees to sell Blackacre to A and by the other he agrees to sell a horse to A. A brings a suit in equity for the specific performance of the first contract. B alleges that he was an infant when the agreement was made. Verdict and judgment for B. Thereafter A brings an action at law against B for damages for breach of the contract to sell him the horse. The judgment in the prior suit is conclusive that the defendant was an infant when the contract was made."

The fact is, the courts have uniformly assumed that the judgment in a non-jury case is entitled to collateral estoppel effect in subsequent jury cases. Thus, in *Grantader v. Public Bank*, 417 F.2d 75 (6th Cir. 1969), *cert. denied*, 397 U.S. 1065 (1970), the court applied collateral estoppel in an antitrust action even though the prior judgment had been rendered in a state court action for the appointment of a receiver after a trial by a judge alone. Similarly, in *Vernitron Corp. v. Benjamin*, 440 F.2d 105 (2d Cir.), *cert. denied*, 402 U.S. 987 (1971), the court gave collateral estoppel effect in a federal antitrust action to a prior state court summary judgment.

Further, the collateral estoppel or *res judicata* effect of a determination by an administrative agency has been held to extend to a subsequent court action between the same parties, even though there was a right to jury trial in the latter. *Ellingson Timber Co. v. Great Northern Ry. Co.*,

424 F.2d 497 (9th Cir.), *cert. denied*, 400 U.S. 957 (1970); *Painters Dist. Council No. 38, etc. v. Edgewood Contracting Co.*, 416 F.2d 1081 (5th Cir. 1969); see, *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 421 (1966). Since there can never be a jury in administrative proceedings, the rule that they are entitled to collateral estoppel effect necessarily assumes that such effect cannot be a violation of the right to a jury trial in the subsequent action.

## V

**The "enforcement of the antitrust laws" will be in no way impaired by the denial of certiorari in this contrived, paper-thin action.**

It is evident from the opinion of the Court of Appeals that the court was in no degree influenced by a prejudice against "the private antitrust action" (p. 23). (It is equally evident that petitioners' expression of concern for "lightening the court's burden" [p. 22] is unworthy of credit.)

While the court chose to decide the appeal on the independently sufficient ground of collateral estoppel—the first ground advanced in defendants' brief—it could as easily have reversed on any of four other grounds. These other grounds, particularly in combination, establish the spurious nature of the "antitrust case" presented by *Azalea*.

The truth is, *Azalea* failed to make out a *prima facie* case as to any of the four essential components of this

action based on an alleged conspiracy to boycott: (1) the existence of the *conspiracy*; (2) the *authority* of the auditor who allegedly made the threat; (3) the *coerciveness* of the alleged threat, and (4) *damage* resulting from the antitrust violation. The trial judge erred as a matter of law in permitting any of these issues to go to the jury.

### Conclusion

**The petition for a writ of certiorari should be denied.**

Respectfully submitted,

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